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No. 85-498

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SANDRA ABERNATHY, *et al.*,
Petitioners,

v.

SAN JOSE TEACHERS ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the California Supreme Court was correct in concluding that dissenting agency fee payers who fail to "advance a colorable claim that the union's escrow and rebate procedures do not comply with federal constitutional requirements" must continue to pay their fees pending litigation of a challenge to the amount collected.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent San Jose Teachers Association submits that the Petition for a Writ of Certiorari should be denied, and files this brief in opposition to the Petition.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE MISCHARACTERIZED THE DECISION OF THE CALIFORNIA SUPREME COURT, AND SEEK REVIEW OF ISSUES THAT WERE NOT DECIDED BY THAT COURT.

A. The first of the two Questions Presented in the Petition for Certiorari is as follows:

> When a Union Brings Suit to Collect Moneys Due From Public Employees Pursuant to an Agency

Shop Provision of a Collective Bargaining Agreement, What Procedures or Safeguards are Required in Order to Protect the Constitutional Rights of Those Employees who Object to use of Their Contributions for Political or Ideological Purposes, or Other Purposes Unrelated to Collective Bargaining?

The clear implication to be drawn from this question is that the constitutional adequacy of the procedure established by respondent to deal with objections from agency feepayers was ruled upon by the California Supreme Court. This is not in fact so. Petitioners did not raise this issue in the court below, and, accordingly, that court had no occasion to address it.

The agency fee provision in this case is not of the classic variety. Unlike the typical arrangement—pursuant to which the fee automatically is deducted from the dissenting employee's salary, or payment is made a condition of continued employment and a non-complying employee is subject to termination—respondent was required to institute a civil suit to recover the amount of the unpaid fees.[1] In their answer to the Complaint, petitioners objected to paying the amount requested because, they contended, some portion of the fee would be used for constitutionally impermissible purposes. Respondent moved for summary judgment for the full amount, arguing that petitioners' objections were premature. It was respondent's position that employees who object to particular expenditures must nevertheless pay the full amount of the fee and thereafter assert their objections through a separate proceeding. App. 2a-3a.

In support of its motion for summary judgment, respondent submitted a declaration from the Executive Director of its statewide parent organization, the California

[1] The California Supreme Court has held that this approach is proper under the California Educational Employment Relations Act (EERA). *See, San Lorenzo Education Assn. v. Wilson*, 32 Cal.3d 841, 844 (1982).

Teachers Association (CTA), describing the refund procedure that CTA had adopted for the 1981-82, 1982-83 and 1983-84 membership years.[2] Petitioners did not challenge the factual assertions made by the CTA Executive Director, nor did they specifically contend that the CTA refund procedure failed to comply with the constitutional standards set forth by this Court, preferring to argue instead that respondent "must await a final [judicial] determination of the *Abood* amount [*i.e.*, the amount that objecting employees constitutionally may be required to pay] before recovering *any portion* of the fee." App. 27a (emphasis added).

Inasmuch as the issue was not joined, the constitutional adequacy of respondent's refund procedure was not discussed by the California Supreme Court. The court limited its ruling to those situations in which the union's procedure is constitutional. Thus, in determining that respondent was entitled to summary judgment, the court stated:

> We conclude that *because a union whose collection procedures meet the requirements of Ellis is* entitled to collect the *entire fee*, regardless of what is ultimately determined to be the *Abood* amount, the actual *Abood* amount is not at issue in an action brought by a union to collect its agency fees and, therefore, does not constitute a triable issue of material fact precluding summary judgment.

App. 30a-31a. (first emphasis added). *See also*, App. 25a-26a:

> If the agency shop clause in this case had been of the classic variety, *i.e.*, dependent upon removal from employment for its enforcement, employees seeking to enjoin its enforcement would not be entitled to such relief, *at least absent a showing that the*

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[2] This procedure is briefly summarized by the court below at App. 3a-4a.

> *amounts computed by the union and placed in escrow (or offset against the agency fee) were unreasonably low, or that the rebate procedures adopted by the union were unfair. Defendants make no such showing here.* (emphasis added).

Similarly, in the second portion of its decision, after concluding that a challenge to the amount of an agency fee must be presented, in the first instance, to the California Public Employment Relations Board (PERB), the court noted:

> We need not, and do not, decide whether similar preemption principles should apply when, in an action brought by the union for collection of agency fees, *the dissenting employees advance a colorable claim that the union's escrow and rebate procedures do not comply with federal constitutional requirements.* App. 36a, n.16 (emphasis added).

B. Although the California Supreme Court's conclusion that the "actual *Abood* amount is not at issue in an action brought by a union to collect its agency fees and, therefore, does not constitute a triable issue of material fact precluding summary judgment," App. 30a-31a, was dispositive, it went on to observe that "[a]ny dispute as to the *Abood* amount may be made the subject of a collateral proceeding." *Id.* The court then proceeded to consider "the question whether that collateral proceeding should be in court, or before PERB." *Id.*[3] Applying what

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[3] As an independent ground for its summary judgment motion, respondent had:

> relied upon California case law to the effect that an action alleging unconstitutional uses of an agency fee must, in the first instance, be brought to the PERB for resolution, since the actions complained of also constitute arguable violations of the EERA.

App. 4a.

it termed "familiar principles of agency preemption" (*i.e.*, "that conduct which is alleged in a judicial proceeding to be unlawful must first be heard by PERB where the conduct is arguably protected or prohibited by the EERA and where PERB could furnish relief equivalent to that which could be provided by the court," App. 31a), the court stated that a challenge to the amount of the agency fee must, in the first instance, be presented to PERB. Contrary to petitioners' assertion, the court below did not hold, or even suggest "that non-union employees [must] utilize an intra-union procedure as a prerequisite to judicial protection from the union's use of their compulsory service fees for unconstitutional purposes." Petition at 15.[4]

The second Question Presented in the Petition for Certiorari is:

> Does a system which requires an objecting nonmember to pay the entire fee and then resort to the union's internal rebate procedure adequately protect the constitutional rights of dissenters?

As the foregoing discussion indicates, this question has no reference point whatsoever in the decision of the court below.[5]

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[4] Petitioners' reference to this Court's decision in *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982), Petition at 14, is inapt. There is nothing in the California Supreme Court's holding or analysis to suggest that exhaustion of the PERB administrative remedy is a prerequisite to seeking judicial relief in a *federal forum*—the court was referring solely to the relationship between a state administrative agency and the state courts.

[5] Nor can it be argued that exhaustion of respondent's refund procedure is the indirect consequence of the court's ruling, since PERB has held that exhaustion of a union's internal procedure is *not* a pre-requisite to the exercise of its jurisdiction. *King City High School District Association* (Cumero), PERB Decision No. 197, p. 33 (1982), pending before California Supreme Court on other grounds, No. SF 24905.

The simple fact is that petitioners are attempting to litigate in this Court issues that were not raised or decided in the court below. These issues cannot properly provide the basis for granting certiorari.

II. THE ISSUE ACTUALLY DECIDED BY THE CALIFORNIA SUPREME COURT DOES NOT WARRANT REVIEW; INDEED, PETITIONERS DO NOT EVEN SEEK REVIEW OF THAT ISSUE.

The issue before the California Supreme Court in this case was a narrow one. That issue was whether respondent was entitled to summary judgment, and in unanimously concluding that it was, the court made a single, dispositive constitutional ruling:

> We conclude that because a union whose collection procedures meet the requirements of *Ellis* is entitled to collect the *entire* fee, regardless of what is ultimately determined to be the *Abood* amount, the actual *Abood* amount is not at issue in an action brought by a union to collect its agency fees and, therefore, does not constitute a triable issue of material fact precluding summary judgment. App. 30a-31a (emphasis in original).

This ruling represents a proper application of this Court's agency fee decisions to the facts of this case, establishes no new principles of federal law, and is not in conflict with the decision of another state court of last resort or a federal court of appeals. Accordingly, it does not warrant review by this Court. Nor is there any merit to petitioner's alternative suggestion that "[a]t the very least, action on the petition should be postponed until the guidance inherent in the plenary consideration of *Hudson* [*v. Chicago Teachers Union, Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3863 (U.S. June 11, 1985) (No. 84-1503)] is available," Petition at 8, since the decision below is totally compatible with the position taken by the 7th Circuit in *Hudson*.

A. This Court has made it abundantly clear that the one remedy that is *not* appropriate in agency fee cases is an injunction that relieves dissenting employees of the obligation to provide any fiscal support to their exclusive collective bargaining representative. *Abood v. Detroit Board of Education*, 431 U.S. 209, 240-241 (1977); *Railway Clerks v. Allen*, 373 U.S. 113, 119, 122 (1963); and *Machinists v. Street*, 367 U.S. 740, 772 (1961). As this Court explained in *Street*, any injunction restraining fee collection:

> sweeps too broadly . . . [and] might well interfere with the . . . union's performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

367 U.S. at 771 (quoted in *Allen*, 373 U.S. at 120). Indeed, in *Abood*, even though the Michigan statute at issue had been construed by the state court as providing objectors with no protection against use of their fees for partisan political purposes, 431 U.S. at 232-233, this Court held that the Michigan court was correct in denying broad injunctive relief, *id.* at 240-241.

The federal appellate courts that have considered the question uniformly have interpreted this Court's precedents as precluding an injunction against the collection of agency fees. *See, e.g., Champion v. State of California*, 738 F.2d 1082, 1084-85 (9th Cir. 1984), *cert. denied*, —— U.S ——, 105 S.Ct. 1230 (1985); *Robinson v. New Jersey*, 741 F.2d 598 (3rd Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1228 (1985); *Dean v. Trans World Airlines, Inc.*, 708 F.2d 486 (9th Cir.), *cert. denied*, 484 U.S. 995, 104 S.Ct. 4[illegible] (1983); *Perry v. Machinists Local Lodge 2569*, 708 F.2d 1258 (7th Cir. 1983).

It is clear, therefore, that if the agency fee provision in this case was of the classic variety—pursuant to which the fee automatically is deducted from the dissenting

employee's salary, or payment is made a condition of continued employment and a non-complying employee is subject to termination—dissenting employees would not be entitled to enjoin its enforcement. But the agency fee provision at issue is atypical, in that respondent was required to institute a civil suit to recover the amount of the unpaid fees. Relying upon this distinction in an effort to avoid the precedential effect of this Court's anti-injunction position, petitioners contended in the court below "that the result must be different when it is the union that is seeking relief, in the form of a summary judgment for the specific amount." App. 26a. The California Supreme Court disagreed. It viewed this difference in the method of enforcement as one of form, not substance, stating:

> It is true that in *Street*, *Allen* and *Abood* the dissenting employees were the plaintiffs seeking injunctive relief from the court. However, it was their status as employees—not their status as plaintiffs—which supported the court's holding that they must 'pay first and complain later.' The court was concerned that if employees were allowed to withhold agency fees pending litigation of the *Abood* amount, the union would be unable adequately to perform its vital role in the collective bargaining system.

App. 27a-28a. (footnote omitted). Accordingly, the court concluded that:

> Were we to permit defendants in this case to withhold payment of all fees pending litigation of the *Abood* amount, we would be sanctioning a form of 'self-help injunction,' contrary to the very concerns expressed by the Supreme Court in [*Street*] and *Allen*.

App. 28a-29a.

In sum, the court below correctly recognized that if it is improper for courts to enjoin the collection of agency fees simply because a portion of the money may

be used for purposes unrelated to collective bargaining, it likewise is improper for courts to deny relief to a union that seeks to collect such fees in the first instance.

B. In urging that certiorari be granted, petitioners take the position that the decision of the California Supreme Court is in conflict with the decisions of this Court in *Abood* and *Ellis*, and the decisions of the 7th Circuit Court of Appeals in *Hudson v. Chicago Teachers Union, Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3863 (U.S. June 11, 1985) (No. 84-1503), and the Massachusetts Supreme Judicial Court in *School Committee of Greenfield v. Greenfield Educ. Assn.*, 385 Mass. 70, 431 N.E.2d 180 (1982). Specifically, we understand petitioners to be contending that this conflict exists because, according to petitioners, respondent's refund procedure does not satisfy the constitutional standards set forth in the cited cases [6].

The short, and dispositive response to this contention is found in the qualified nature of the sole proposition of constitutional law that emerges from the decision of the court below—*i.e.*, "*a union whose collection procedures meet the requirements of Ellis* is entitled to collect the

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[6] In an apparent effort to also suggest a conflict with the "substantive" component of the *Abood* and *Ellis* decisions, petitioners assert that "the court below now has authoritatively construed California law to permit the use of service [*i.e.*, agency] fees for any purpose including political activities." Petition at 13. Petitioners again mischaracterize the holding of the California Supreme Court. The court did not in fact make *any* determination *vis-a-vis* the purposes for which compelled fees may be used over objection, but held rather that:

> [T]he actual *Abood* amount is not at issue in an action brought by a union to collect its agency fees and, therefore, does not constitute a triable issue of material fact precluding summary judgment. Any dispute as to the *Abood* amount may be made the subject of a collateral proceeding.

App. 31a [footnote omitted].

entire fee, regardless of what is ultimately determined to be the *Abood* amount. . . . " App. 30a (first emphasis added). As previously noted, because petitioners did not challenge the constitutional adequacy of respondent's refund procedure in the California Supreme Court, that court had no occasion to determine what is or is not acceptable in this regard. The court made only brief factual reference to respondent's refund procedure at the outset of its decision, App. 3a-4a, and expressly limited its ruling to those situations in which the union's procedure is constitutional, *see* App. 26a, 36a. Accordingly, even if respondent's refund procedure were constitutionally deficient, this case would not be appropriate for certiorari inasmuch as there is no relevant constitutional holding or analysis for this Court to review.

CONCLUSION

In determining that respondent was entitled to summary judgment, the California Supreme Court held that dissenting employees must continue to pay their agency fees while they litigate a challenge to the amount collected, at least in the absence of a colorable claim that the union's refund procedure does not comply with federal constitutional requirements. This holding is in complete accord with this Court's decisions in *Abood* and *Ellis*, and does not in any way conflict with the decisions in *Hudson* or *Greenfield*. The Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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